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No. 90-23

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

FOOD CHEMICAL NEWS, INC., ET AL., PETITIONERS

v.

JAMES BENSON, ACTING COMMISSIONER,
FOOD AND DRUG ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Advisory Committee Act applies to a panel of experts convened and used by a private organization under contract with the federal government.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 900 F.2d 328. The opinion of the district court (Pet. App. 11a-22a) is reported at 709 F. Supp. 5.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1990. The petition for a writ of certiorari was filed on June 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1972, Congress enacted the Federal Advisory Committee Act, 5 U.S.C. App. 1. The statute attempts, inter alia, to reduce the number and costs of certain groups advising Congress, the President, and federal agencies, to terminate those that have outgrown their usefulness, to increase the accountability of those that remain, and to provide uniform procedures for their "establishment, operation, administration, and duration." 5 U.S.C. App. 2(b)(4).

The Act governs any "advisory committee"—defined as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof" that is "established" or "utilized" by the President, by the Congress, or by an Executive Branch agency. 5 U.S.C. App. 3(2).[1] An "advisory committee" is duly established only upon the filing of a public charter, which expires in two years. 5 U.S.C. App. 9(c), 14(a)(2). For such committees, the Act mandates public scrutiny: Each meeting of the "advisory committee" must be "open to the public," 5 U.S.C. App. 10(a); chaired or attended by a government representative, 5 U.S.C. App. 10(e); recorded in detailed minutes made available for "public inspection and

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[1] The Act provides in part, 5 U.S.C. App. 3(2):

> The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof * * * which is—
>
> * * * *
>
> (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government * * *.

copying," 5 U.S.C. App. 10(b) and (c); and preceded by advance notice in the *Federal Register*, 5 U.S.C. App. 10(a)(2).

2. To assist in directing its future regulatory efforts, the Food and Drug Administration (FDA) in March 1988 solicited bids for a contract to obtain expert advice on a range of issues associated with the safety of food and cosmetics. Pet. App. 11a. The Federation of American Societies for Experimental Biology (FASEB) bid on and was awarded the contract. The solicitation by the FDA did not require the contractor to appoint expert panels or to maintain any particular organizational structure, Pet. App. 3a, but FASEB proposed using ad hoc groups of knowledgeable experts as a means of carrying out the contract. While FASEB proposed obtaining the scientific community's consensus, in part, by convening ad hoc panels of experts, the proposal made plain that the "[d]raft reports, revisions, and tentative and final reports are [to be] prepared by [FASEB's] LSRO [Life Science Research Organization] scientific staff." C.A. App. 83.

The contract between the FDA and FASEB provided that the FDA would assign FASEB up to ten different "tasks," with the subjects to be determined by the FDA at a later date. Incorporating the approach outlined by FASEB in its technical proposal to the solicitation, C.A. App. 305-306, the FDA issued Task Order No. 3 in August 1988, requesting FASEB's advice on emerging food safety issues. In accord with FASEB's bid, the Task Order specified that, C.A. App. 111:

> The contractor shall assemble an expert panel of scientists who have expertise in the areas of life sciences, food sciences and risk assessment or cost benefit analysis. Members of the panel

> should represent academia, industry, consumer, government and professional associations as appropriate. The panel will prepare a report to the contractor[.]

But the Task Order further required that, *ibid.*:

> The contractor shall review all comments and information * * * and prepare a report for submission to FDA.

To start the work that Task Order No. 3 required, FASEB members identified the relevant issues, undertook a literature search, requested pertinent information from the public, and identified experts in the field. C.A. App. 124-125, 182. They also analyzed data and drafted background material for the proposed panel.

In the meantime, FASEB invited experts to work with LSRO in completing the contract. The planned ad hoc working panel was scheduled to meet twice. C.A. App. 138. The panel members were selected by the LSRO, but "[a]t no time during this selection process was any FDA official made aware of the list of candidates." C.A. App. 299. Chosen primarily from the ranks of professional scientists affiliated with academic institutions, members also included one individual associated with a consumer group, one from an industry association, and a third from a private law firm. *Ibid.* A panel meeting was held on January 11-13, 1989, part of which was open to the public and part of which was not, and a further meeting was scheduled for April 1989. C.A. App. 300.

3. Shortly before the January 1989 meeting took place, petitioners brought this suit against FASEB and the FDA, claiming that the ad hoc panel assembled by FASEB was subject to the FACA. Petition-

ers conceded that the FASEB itself was not an "advisory committee" under the FACA, C.A. App. 179, but petitioners claimed that FASEB had an "advisory committee" within it in the form of the panel.

The district court entered judgment for petitioners. Pet. App. 11a-22a. The court dismissed FASEB on the ground that it was a private corporation to which FACA did not apply, a conclusion that the district court found petitioners had not "contested." *Id.* at 13a. At the same time, the court held that the panel was "established" by the FDA under FACA, since the FDA had issued the Task Order requesting FASEB to go forward with its technical proposal to set up the panel. *Id.* at 15a-16a. The court also held that the panel was "utilized" by the FDA for purposes of FACA, because the FDA used the panel's advice. *Id.* at 16a-20a.

4. The court of appeals reversed. Pet. App. 1a-10a. Relying on *Public Citizen* v. *United States Dep't of Justice*, 109 S. Ct. 2558 (1989), the court of appeals held that the term "established" "indicates 'a Government-formed advisory committee,'" while the term "utilized" "encompasses a group organized by a nongovernmental entity but nonetheless so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'" Pet. App. 9a (quoting *Public Citizen*, 109 S. Ct. at 2568, 2570). Applying that analysis to this case, the court of appeals held that the expert panel was not "an advisory committee" within the meaning of FACA. The court concluded that "the panel was 'established' by FASEB, not by FDA," because the panel was proposed by FASEB, and FASEB alone selected its members and agenda, scheduled its meetings, and intended to review its work. Pet. App. 10a. Turning to the "utilized" prong of the test, the court noted

that the "final report, under the FDA contract and Task Order, was to be prepared and presented not by the panel but by FASEB." *Ibid.* The panel also "was to be managed by FASEB; it was not amenable to [any] management by [FDA] officials," or "by [any] semiprivate entity the Federal Government helped bring into being." Thus, the court concluded that FASEB, not the FDA, was the entity that "utilized" the panel. *Ibid.*

ARGUMENT

1. Although petitioners argue that the court of appeals misconstrued the terms "established" and "utilized" in FACA, petitioners make no serious effort to explain what the correct interpretation of those terms should be. Instead, petitioners complain that, for three reasons, the court of appeals misread those terms. Petitioners' complaints lack merit.

a. Petitioners contend that the court below should not have treated this Court's decision in *Public Citizen* as a "controlling precedent" on the meaning of the term "established" in FACA. Pet. 11. But the court of appeals correctly noted that although the holding in *Public Citizen* dealt only with the term "utilize," this Court's decision also sheds light on the meaning of the term "establish." If "utilize" means to create an advisory committee indirectly through a quasi-public entity, 109 S. Ct. at 2570, "establish" then logically refers to the direct creation of such a committee by an agency itself. In fact, *Public Citizen* itself suggested that dichotomy. *Ibid.* Thus, the court of appeals correctly recognized that *Public Citizen* is instructive on the meaning of the term "establish." [2]

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[2] That interpretation of the term "establish" is supported by FACA's legislative history. The Conference Committee

b. Petitioners also claim that the court of appeals failed to consider the FDA's role in creating the panel and in setting its tasks. Pet. 11. But the court did consider the FDA's role; it just rejected petitioners' claims. In the court of appeals, petitioners argued that the *Public Citizen* case was inapposite, since the ABA committee was not formed at the government's request and the Justice Department did not control the ABA committee. Under *Public Citizen*, however, whether an agency has requested formation of a committee is relevant only if the agency makes the request of a quasi-public entity. 109 S. Ct. at 2570. FASEB is not a quasi-public entity; it is a private organization, as the district court held, Pet. App. 13a. And even if FASEB were a quasi-public entity, the panel at issue here was not formed at the government's request; it was proposed by FASEB. C.A. App. 331, 332. Moreover, the FDA does not "control" the panel. The FDA's contract is with FASEB, not the panel, and it is FASEB that selects the panel's members, briefs them, gathers data for their consideration, and schedules their meetings. C.A. App. 81-86. Although the FDA, through its contract with FASEB, dictates the subject matter of the panel's deliberations, so, too, does the Department of Justice "control" the subject matter of the ABA Committee's deliberations by informing the Committee of the names of judicial nominees. The panel here is therefore no more an FDA advisory committee under the FACA than the ABA Committee on Fed-

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Report states that "[t]he Act does not apply to persons or organizations which have contractual relationships with Federal agencies nor to advisory committees not directly established by or for such agencies." H.R. Conf. Rep. No. 1403, 92d Cong., 2d Sess. 10 (1972); *Public Citizen*, 109 S. Ct. at 2570.

eral Judiciary was an advisory committee to the Department of Justice.

c. Petitioners also argue that the interpretation of the term "utilize" adopted in *Public Citizen* should be limited to the particular facts of that case since a more expansive reading of that term would have raised a serious question of the constitutionality of the Act as applied to the ABA Committee. Pet. 11-12. Although in *Public Citizen* the Court noted that a contrary ruling would present substantial constitutional questions, the Court's holding that the term "utilize" should be defined as "formed indirectly by quasi-public organizations," 109 S. Ct. at 2570, was not dependent on those questions. Indeed, the Court explicitly said that the result did not turn on the presence of those constitutional questions; rather, those questions provided "one additional consideration which, in our view, tips the balance decisively against FACA's application," *id.* at 2572, and that only "solidifies our conviction that FACA is inapplicable," *id.* at 2573.[3]

2. Petitioners contend that review by this Court is necessary because agencies can now "thwart" the purposes of the FACA "by the simple device of a contract intermediary." Pet. 14. But petitioners ignore the fact that Congress itself clearly intended to exempt contractors from the Act and, as the court of

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[3] Petitioners also claim that the court of appeals misread FACA because that court adopted a narrower interpretation of FACA than the one that the government endorsed in the *Public Citizen* case. Pet. 12. This Court in *Public Citizen*, however, adopted an interpretation of the statute that differed from the one proposed by the government. Accordingly, it was to this Court's decision in *Public Citizen*, not to the government's brief in that case, that the court of appeals properly looked.

appeals explained, Pet. App. 6a-7a, had good reason for doing so.

Petitioners also raise the spectre of sham contracts used in order to avoid complying with FACA.[4] But petitioners do not, and cannot claim that this contract with FASEB, a well-respected scientific organization, was a sham, and there is no basis for petitioners' suggestion that the FDA or any other agency would enter into a sham arrangement to avoid the requirements of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioners erroneously claim that we have taken the position that FACA would not apply even if an intermediary were a " 'nonentity,' and hence its use essentially a sham." Pet. 13. The government's reply brief in the court of appeals acknowledged that an agency could not avoid FACA by entering into a contract with such an organization. Gov't C.A. Reply Br. 3 ("The only exception would be the case in which the so-called parent organization is a sham—which the Federation is not—and the subcommittee is in fact the organization with which the government will deal.").

* The Solicitor General is disqualified in this case.

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